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Parental photography at school events: going beyond the exemption in section 36

Claire Bessant, Principal Lecturer at Northumbria Law School explores the legal issues that may arise in the UK when a family member takes a photograph or video at a school event, and reviews current education authority guidance on the issue

According to the 2013 OFCOM Adults Media Use and Attitudes Report, 64% of adult internet users have a social network profile, and 17% of social network users share video clips and other content online. Since many individuals also use photo sharing sites such as Flickr, or use blogs and websites to share family information, it seems sensible to assume that some parents are sharing photographs of their children online.

It is, therefore, entirely foreseeable that when parents take photographs at school events, some of those parents will wish to share those photographs online. Since photographs of school events will often capture images of other children, parents may be sharing photographs online, not only of their own children, but also of other people's children.

The fact that some parents may now share images online has certainly been recognised by many education authorities. A survey of education authorities undertaken by the author between December 2013 and February 2014 confirms that many authorities explicitly refer in their internal guidance to the risks that such dissemination of images may pose.

The research revealed that 41% of those that provide guidance now treat parental photography at school events as a safeguarding issue, with 12% viewing it as an 'e-safety' issue. A smaller, albeit not insignificant number of authorities also recognise that online dissemination of children's images may raise privacy issues (18% of authorities that provide guidance refer to privacy or human rights).

However, many local authorities treat the issue of parental photography at schools solely as a data protection matter, relying upon guidance published by the Information Commissioner's Office ('the ICO'). 23% of authorities who responded explicitly refer schools to the ICO guidance, many more quoting ICO guidance in their own publications.

The ICO guidance has been reissued in many forms over the past decade. Common to all versions of the guidance is the assertion that, when a family member takes a photograph

or video at a school event, the domestic purposes exemption at section 36 of the Data Protection 1998 ('the DPA') applies. Parents thus have no obligation to comply with the DPA (see 'Data Protection Good Practice Note Taking Photographs in Schools' (2005, 2007, 2010, 2014), 'Report on the data protection guidance we gave schools in 2012' (2012); 'Parents can snap away at this year's sports day' (2010); 'Parents can snap away this Christmas' (2010); and 'Does the Data Protection Act stop me taking photos of my children at school?' (undated)). (All of the guidance referred to may be obtained upon emailing docs@pdpjournals.com).

Several of the education authorities contacted as part of the abovementioned research, seem, therefore, to assume that there is now no reason why parents cannot take photographs or video their children at school events. Media articles suggest some members of the public are of the same opinion (see for example the article that appeared in *the Telegraph*, 'Parents can take photos of school nativity plays, say information watchdog', 8th December 2010).

The reality is that there may be practical reasons for a school to restrict photography. Data protection is only one of the legal issues that schools need to consider. In the 'digital age', when photos are no longer always stored safely at home, the legal position is far more complicated than the ICO suggests.

This article accordingly reviews the legal issues that schools now need to consider when formulating school photography policies. Drawing upon current education authority guidance, it suggests how schools might ensure all relevant legal and practical issues are addressed.

Revisiting section 36

The first of the legal issues for consideration is section 36 of the DPA.

In its guidance, the ICO refers to parents storing photographs in albums and to grandparents taking videos

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(presumably to watch in their own home). No reference is made to photographs being shared online.

How does section 36 apply when parents take photographs which they intend to post online?

Whilst this issue is not addressed by the ICO in its guidance on photographs in schools, the ICO has suggested elsewhere that section 36 applies 'whenever someone uses an online forum purely in a personal capacity for their own domestic or recreational purposes' (see 'Social networking and online forums when does the DPA apply?', 2013).

On this basis, it would seem that the ICO considers that it makes no significant difference whether a parent takes a photograph of a school event and stores it in an album, or shares it on Facebook, provided that the actions are taken for domestic, family or personal purposes.

If one accepts the ICO's position, parents that post photographs of school events on social media need not tell other parents that they are uploading photographs of their children, nor obtain the consent of those pupils or parents. Further, they do not need to fear sanctions from the ICO.

Arguably, however, the ICO's 2013 guidance does not fully answer the question posed above. Whilst the guidance specifically covers those

cases where individuals contribute to online forums such as social networking sites, message boards and blogs, it does not advise how the DPA applies when an individual shares photographs online via a photo sharing site such as Flickr, or upon publicly available websites. The other concern that must be highlighted is the fact that the ICO's opinion is seemingly at odds both with the views of the Article 29 Data Protection Working Party and the European Court of Justice ('the ECJ').

The data protection implications of individuals sharing information on social media were considered by the Article 29 Working Party as long ago as 2009 ('Opinion 5/2009 on online social networking, 00189/09/EN WP 163'). That opinion considers the provision upon which section 36 is based — Article 3(2) of Directive 95/46/EC ('the Directive').

Contrary to the ICO, the Working Party concluded that, even when an individual is processing information online for personal or recreational purposes, there will be instances when such activity

cannot be treated as 'purely personal or household activity'. Article 3(2) (and thus arguably section 36) would not apply if, for example:

- a user has a high number of contacts/friend, some of whom he does not know;

- 'access to a profile is provided to all members within the social networking service, or the data are indexable by search engines'; or
- when the individual has taken 'an informed decision to extend access beyond self-selected 'friends'.

If one accepts this reasoning, section 36 does not automatically apply whenever a parent is posting images in their personal capacity 'for personal, domestic, family or recreational purposes'. Indeed, since research suggests that, on average, 'UK adults with a social networking profile have 237 friends or contacts on their main social networking site' (from the OFCOM report mentioned above), significant numbers of parents might not be able to rely upon section 36 when sharing photographs on social media.

Since the ECJ in the leading European case of *Lindqvist* (ECJ C-101/01) explicitly stated that Article 3(2) does not apply to 'the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people', it seems similarly that where parents make photographs publicly available on websites or to blogs, they cannot rely upon Article 3(2)/section 36.

If section 36 does not apply when a parent disseminates photographs online, then the parent must comply with the Data Protection Principles of the DPA, (and thus obtain consent for processing images of children other than their own). Alternatively, they must limit the number of individuals that can access those photos, or refrain entirely from sharing photographs online.

Many authorities already recognise this. Indeed, several education authorities surveyed as part of the author's research advise schools that even if parents are permitted to take photographs, this does not authorise them to post those photographs online, and that if photographs are uploaded without the consent of all those whose images are disclosed (or their parents), the parent photographer may breach the DPA.

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Safeguarding children

Breaching the DPA is not, of course, the only reason why a school might tell parents not to disseminate photographs of school events online. The child protection charity, the NSPCC, highlights a number of risks that may be posed when photographs of children are posted online. These include the risk that the photograph itself might be used inappropriately, and the risk that a child can be identified from their image and information about their school, such identification making them 'vulnerable to individuals looking to 'groom' children for abuse' (see the NSPCC Factsheet: 'Using photographs of children for publication', 2013).

Many authorities also recognise that when photographs of school events are posted online, the simple act of posting the image, revealing that a child attends a particular school, may be detrimental to the welfare, safety and wellbeing both of a child and their family (for example when a child is fleeing violence or abuse and it is not safe for their whereabouts to be disclosed).

If the posting of a child's image results in a violent or abusive individual locating them and causing them harm, the child's right to life (as guaranteed in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR')) and their right not to be subjected to inhuman and degrading treatment (Article 3) may be engaged. Schools must bear this mind; as public authorities, they must not act in a way that is incompatible with ECHR rights (Article 6 Human Rights Act 1998 ('HRA')).

Section 175 of the Education Act 2002 also requires education authorities and governing bodies of maintained schools to exercise their functions with a view to safeguarding and promoting the welfare of children. This term encompasses 'protecting children from maltreatment, preventing impairment of children's health or development, ensuring that children grow up in circumstances consistent with the provision of safe and effective care, and taking action to enable all children to have the best outcomes' (see Department for Educa-

tion, 'Working Together to Safeguard Children', 2013, p.37)

Both statutes thus clearly place the onus upon education authorities and schools to consider the risks that may be posed to children by photography at school events, including the risks posed by subsequent online dissemination. Whilst many authorities that discuss safeguarding issues suggest that these risks are small, it is worth noting that more than 20% of adults with a social networking profile share photographs with people potentially unknown to them (see the OFCOM report, at p99).

Schools really cannot tell, therefore, with whom parents are sharing their pupils' images.

Privacy

The fact that photographs that are shared on the internet may be copied, disseminated further and are potentially available forever, of course, not only raises safeguarding issues, but also raises privacy issues.

It is well accepted that the concept of private life, protected by Article 8 of the ECHR, protects a person's right to their image (*Sciacca v Italy* App no 50774/99 (2005) 43 EHRR 20 [29]).

It has been said that 'the touchstone of private life is whether, in respect of the disclosed facts, the person in question had a reasonable expectation of privacy' (*Campbell v MGN* [2004] UKHL 22 [21]). Whether a child does have a reasonable expectation of privacy when photographs are taken at a school event is something which neither the courts nor the tribunals have considered.

However, in *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 [36], Sir Anthony Clarke MR offered some guidance on the factors to be considered when determining whether a reasonable expectation of privacy exists. The guidance suggested, for example, that one should consider 'all the circumstances of the case [including] the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the

absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'

Taking this guidance into account, it is possible that some children or their parents will consider that the child's photograph should not be shared online, that they should be told when parental photography will take place and should be asked to consent to such photography.

When the parents of a vulnerable child have informed a school that his or her whereabouts are to be kept secret, those parents will almost certainly expect the school to ensure that their child's privacy is respected.

If a school allows parents to take photographs or videos without restriction, might the school accordingly be at risk of legal action founded on the fact that it failed to protect pupils' Article 8 rights and thus breached its obligations under the HRA?

Current best practice

96 of the 206 education authorities in England, Scotland and Wales provided the author with details of their guidance. Many of these authorities had already considered the legal issues outlined above.

Whilst some authorities surveyed did consider that schools could impose an outright ban on photography in order to protect children's rights, most considered it to be a disproportionate response, one which would fail to appropriately balance children's rights and parental rights to freedom of expression.

Instead, what was suggested were numerous alternative options designed to manage disruptions to the audience and distractions to the children, to ensure compliance with the DPA, and to balance the rights of parents and children.

Option 1: Photography allowed but parents advised not to upload images. Whilst some authorities

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suggest that parents should agree that photographs are only 'for personal use', this term may be open to different interpretations. If schools wish to prohibit online sharing this needs to be made explicit.

Option 2: Photography allowed but parents must confirm in writing that they will comply with certain guidelines, for example, a requirement that photographs will be kept securely, that they will be shared only with family members, and that they will not be disseminated online without the consent of those with parental responsibility for all children captured in the images. Sanction for breach of those guidelines might include a prohibition on attending future events.

Option 3: Photography allowed only at specified time and place (the end of a performance, a dress rehearsal, when winners receive medals at sports day) and again photographs are not to be shared online. Such an approach not only prevents disruption and distractions, but also enables children to be removed from shot if their photographs cannot be taken.

Option 4: Parents may take photographs or videos only if they stand at the back of the audience.

Option 5: Parents register to take photographs, receiving an identification tag making it easier for the school to identify individuals who should not be taking photographs. Photographs are not to be shared online.

Option 6: Photography permitted only when all parents provide consent.

Option 7: Photographs to be taken only of those children whose parents have consented to parental photography (children for whom consent has not been provided may be given a role 'back stage' or as narrator).

Option 8: No parental photography. Official photographs or videos to be

taken by an individual who has had appropriate Criminal Record Bureau checks and then sold to parents (in this case the school has a greater measure of control over the use of images).

(NB: Options 3-7 might also include a prohibition on online sharing.)

Authorities rarely stipulate that schools must adopt one of the above approaches. Frequently, however, it is suggested that schools do allow some photography, on the proviso that photographs should not be shared online. Such an approach ensures that parents may record special occasions involving their children, but that there is no breach of the DPA, minimal impact on other children's privacy and limited risks to children's wellbeing.

Whatever approach is adopted, many authorities emphasise that communication is key to community acceptance of the policy, and to its effective implementation. It is thus suggested that parents are made aware of the risks that are posed to children when images are shared online and encouraged to think about the consequences of such online sharing.

They might be advised that, once an image is posted online, it is likely to stay there forever, that for personal and religious reasons, some people may not want images posted online, and that some children who have complex backgrounds should not have their images shared online for their own protection.

Parents need certainly to be made aware of school policy well in advance of any event, both to maintain good school-parent relationships and to ensure that necessary arrangements can be made if a parent does object to their child's photograph being taken.

The guidance also suggests that schools regularly remind parents of their photography policies, first providing information in the school prospectus or brochure, confirming the school's intentions and the reasons for its decision before each event and/or at the start of each new school year, and again reiterating the policy at the start of each event. It

is suggested that prospectuses and letters clarify that if there is a reason why a child should not be photographed, for example if the identity of a child should not be disclosed, the parent must inform the school, in writing.

Ultimately, the approach that a school chooses to take will depend upon various factors: the size of the school and its ability to monitor photography/videography; the nature of the event (whether it is open to the public); the manner in which the children are dressed (and whether misuse of images might be a concern); whether parents have objected to their children being photographed/ videoed by other parents; whether the school is aware of any child protection issues; and how disruption and distractions can best be managed.

Whilst discussions with parents may facilitate parental acceptance of a school's photography policy, the final decision as to whether photography takes place, and the conditions that will apply, rests with the head teacher in consultation with governors.

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